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91-264

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THOMAS A. WILLIAMS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Did a bank customer in 1984 have fair warning consistent with the Fifth Amendment's guarantee of due process that he could be subject to criminal liability under the Bank Secrecy Act of 1970 for a bank's failure to file currency transaction reports with respect to the customer's multiple transactions in currency individually totalling less than $10,000?

2. Can the language of a form issued under the Paperwork Reduction Act but not pursuant to the notice and comment requirements of the Administrative Procedure Act create criminal liability not otherwise existing under the applicable statutes or regulations in effect at the time?

3. Is the prosecution for failure to report in 1984 multiple currency transactions, each of which was less than $10,000, an *ex post facto* application of the Money Laundering Control Act of 1986 and the 1987 Amendments to Implementing Regulations Under the Bank Secrecy Act?

LIST OF PARTIES

The Petitioner before this Court is Thomas A. Williams. The Respondent is the United States. Other parties to the underlying proceedings are Ronald Meyer, Fred Wilmot and Leon Miller a/k/a Lee Miller. Former defendants Farm & Home Savings Association and Ronald Whitaker entered into plea agreements with the United States and are no longer parties to this case.

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Petitioner Thomas A. Williams respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered May 13, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 932 F.2d 1256 (8th Cir. 1991) and is reprinted in the Appendix. (A-1). The opinion of the United States District Court for the Eastern District of Missouri is unreported and is reprinted in the Appendix. (A-13).

JURISDICTION

The jurisdiction of the United States Court of Appeals for the Eighth Circuit was invoked by the United States pursuant to 18 U.S.C. § 3731, which authorizes an appeal by the United States from a decision of a district court dismissing an indictment as to any one or more counts. The Eighth Circuit entered its judgment on May 13, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTION AND STATUTORY PROVISIONS AND RULES INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person . . . shall be deprived of life, liberty, or property, without due process of law. . . .

Article 1, Section 9, clause 3 of the United States Constitution provides:

> No Bill of Attainder or ex post facto Law shall be passed.

31 U.S.C. § 5313(a) (1982) of the Bank Secrecy Act of 1970 provides, in pertinent part:

> (a) When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. . . .

31 U.S.C. § 5322 (1982 & Supp. II 1984) provides, in pertinent part:

(a) A person willfully violating this subchapter or a regulation prescribed under this subchapter . . . shall be fined not more than $250,000, or imprisonment [sic] not more than five years, or both.

(b) A person willfully violating this subchapter or a regulation prescribed under this subchapter . . . while violating another law of the United States or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned for not more than 10 years, or both.

. . . .

Prior to October 12, 1984, Section 5322(a) provided for a maximum fine of $1,000 and a maximum term of imprisonment of one year. 31 U.S.C. §5322(a) (1982).

18 U.S.C. § 2 (1988) provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 371 (1988) provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. . . .

18 U.S.C. § 1001 (1988) provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Also at issue are the Administrative Procedure Act, 5 U.S.C. §§ 501 *et seq.* (1988), and the Paperwork Reduction Act, 44 U.S.C. §§ 3501 *et seq.* (1988).

The following Treasury Department regulations, promulgated under 31 U.S.C. § 5313(a) and in effect at the time of the conduct alleged in the indictment, are also at issue:

> Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through or to such financial institution, which involves a transaction in currency of more than $10,000.00. Such reports shall be made on forms prescribed by the Secretary and all information called for in the forms shall be furnished.

31 C.F.R. § 103.22(a) (1984). "Financial institution" was defined by the regulations as "[e]ach agent, agency, branch, or office within the United States." 31 C.F.R. § 103.11(g) (1984). This definition was amended in 1987 to encompass "all of its domestic branch offices. . . ." 31 C.F.R. § 103.22(a)(3) (1987).

Finally, Treasury Department Form 4789, issued on December 2, 1982, not under the Administrative Procedure Act but under the Paperwork Reduction Act, included the following language:

Multiple transactions by or for any person which in any one day total more than $10,000 should be treated as a single transaction, if the financial institution is aware of them.

STATEMENT OF THE CASE

On September 13, 1989, Petitioner Thomas A. Williams was indicted by a Grand Jury empaneled by the United States District Court for the Eastern District of Missouri. Also named in the indictment were Ronald Meyer, Ronald Whitaker, Fred Wilmot, Leon Miller and Farm & Home Savings Association. A superseding indictment against these defendants was returned by the Grand Jury on November 8, 1989.

Count I of the superseding indictment alleges a conspiracy among all the defendants in violation of 18 U.S.C. § 371. This conspiracy allegedly consisted of a scheme to defraud the United States by impairing, obstructing and defeating the lawful governmental function of collecting data and reports of currency transactions in excess of $10,000 as required by 31 U.S.C. § 5313 and regulations promulgated thereunder. The conspiracy also included, according to the Government, an agreement to commit certain offenses against the United States. Those offenses include violations of the Bank Secrecy Act of 1970 (the "Act"), 31 U.S.C. §§ 5313, 5322, arising from the failure to file Currency Transaction Reports ("CTRs") and to verify and record the information required by those reports. The conspiracy also allegedly embraced violations of 18 U.S.C. § 1001 and § 2, insofar as defendants' conduct had the effect of concealing material facts within the jurisdiction of the Treasury Department or aiding and abetting their concealment.

Among the overt acts supporting the allegations of conspiracy, the superseding indictment alleges that Petitioner Williams had conversations with a confidential informant and undercover agents of the Internal Revenue Service between August 16, 1984 and September 24, 1984. On September 26, 1984,

Williams, along with co-defendant Meyer and an undercover agent, is alleged to have met with Fred Wilmot, a senior vice-president of Farm & Home Savings Association ("Farm & Home"), in Wilmot's offices at the North Dallas, Texas branch of Farm & Home. On that day, according to the superseding indictment, Williams purchased three money orders from three different branches of Farm & Home in Texas for amounts less than $10,000 each.

Count I also lists overt acts involving the purchase of money orders from branches of Farm & Home in the St. Louis area on or about November 28, 1984. Petitioner Williams is not named in any of those overt acts.

Count II alleged substantive violations of 18 U.S.C. § 1001 by Williams, Whitaker, Meyer, Wilmot and Farm & Home as a result of the purchase of money orders from the three Texas branches of Farm & Home on September 26, 1984. Count II was dismissed by United States District Judge William Hungate on May 25, 1990 for lack of venue. The Government did not appeal that dismissal.

Counts III and IV involve only the St. Louis area transactions. Williams was not originally named in these Counts. His name was added with the superseding indictment. Count III alleges substantive violations of the Bank Secrecy Act of 1970, 31 U.S.C. § 5313, § 5322,[1] including causing the failure to file CTRs in connection with the purchase of money orders at three Farm & Home branches in St. Louis that totalled more than $10,000 per person per day, and the aiding and abetting of those viola-

[1] Under Section 5322, it is a felony to willfully violate the Act or a regulation prescribed thereunder, and more severe penalties are imposed for a willful violation while violating another federal law or as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period. The superseding indictment contains allegations of conduct that implicate this Section.

tions by all of the defendants in violation of 18 U.S.C. § 2. Count IV alleges the concealment of material facts from the Government under 18 U.S.C. § 1001 arising out of the St. Louis transactions, and the aiding and abetting of those violations on the part of all of the defendants in violation of 18 U.S.C. § 2.

Petitioner Williams, along with defendants Wilmot, Meyer and Miller,[2] filed a motion to dismiss Counts I, III and IV for failure to state an offense on the ground that there was no duty to file a CTR in connection with the alleged transactions.

On June 27, 1990, the district court entered an order granting Wilmot's motion to dismiss Counts I, III and IV and granting in part and denying in part the motions to dismiss filed by Williams, Meyer and Miller. (A-20). Because it found the Bank Secrecy Act imposes no duty on a customer to disclose his conduct to a bank, the district court granted the motions of defendants Williams, Meyer and Miller to the extent that the indictment charged them with concealing or conspiring to conceal material facts from the Government. (A-20). However, the court denied their motions insofar as the indictment charged that they aided and abetted, or conspired to aid and abet, Farm & Home's failure to file the CTRs. (A-20). On July 19, 1990, the Government filed a Notice of Appeal from the district court's order pursuant to 18 U.S.C. § 3731. The Government's Notice of Appeal challenged the district court's dismissal of all of Counts I, III and IV against defendant Wilmot, as well as the dismissal of portions of Counts I, III and IV against defendants Williams, Meyer and Miller.

The Eighth Circuit reversed. In its decision entered May 13, 1991, the court stated that the "fundamental threshold issue in

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[2] Farm & Home and Whitaker entered into plea agreements with the Government and are no longer parties to this case. Whitaker pled guilty to Count I pursuant to an agreement by the Government to dismiss Count II. Farm & Home pled guilty to a superseding information and was fined $500.00.

this case is whether, under the Act and regulations in effect in 1984, the facts alleged in the indictment imposed a duty on Farm & Home to file one or more CTRs reflecting the St. Louis money order purchases." (A-3). The Eighth Circuit distinguished its earlier decision in *United States v. Larson*, 796 F.2d 244 (8th Cir. 1986), in which it held that a bank customer had no duty under the Act to disclose to a bank his conduct in purchasing ten cashier's checks at four bank branches on the same day. In *Larson*, according to the Eighth Circuit panel below, the bank was unaware of the structured nature of the transactions and thus had no duty to file CTRs. Therefore, the bank customer could not be liable for concealing material facts from the Government or for aiding and abetting a violation of the Act. By contrast, the Eighth Circuit found controlling in the instant case the allegations that the money orders were purchased with the "knowledge, acquiescence and counsel" of a bank officer. (A-5). The Eighth Circuit, citing language appearing on the back of Treasury Currency Transaction Reporting Form 4789, held that these allegations, if proved, would establish that the bank knew that multiple transactions totalling more than $10,000 per day were being structured in an attempt to evade the bank's reporting requirements under the Act. According to the court, this would be sufficient to impose a duty on the bank to file CTRs. (A-5, A-6).

Because it found that a duty existed on the part of Farm & Home to file CTRs, the Eighth Circuit reversed the dismissal of Counts I, III and IV of the indictment as to defendant Wilmot; reversed the dismissal of a portion of Count I, the conspiracy count, with respect to Williams, Meyer and Miller; held that Count III sufficiently alleged that the bank customers aided and abetted in the non-filing of CTRs; and held that Count IV also sufficiently alleged an indictable offense to the extent that it accused the customer defendants of aiding and abetting Farm & Home's concealment of material facts from the Government. (A-7 to A-12).

REASONS FOR GRANTING THE WRIT

The decision of the Eighth Circuit below highlights a pronounced conflict among the Circuits on the legality of the conduct that is the very gravamen of the indictment below. The implications could not be more dramatic: Petitioner faces prosecution and exposure to twenty years of imprisonment and $520,000 in fines for conduct that has been held to be legal in three Circuits, that the General Accounting Office found was not proscribed by statute and regulation three years *before* the events underlying the indictment, and which the United States Attorney for the Central District of California has judicially admitted is not a crime.

This case also raises fundamental questions about the meaning of "fair warning" under the Due Process Clause of the Fifth Amendment and whether executive agencies can criminalize conduct without benefit of regulation and adherence to the procedural requirements of the Administrative Procedure Act ("APA"). Since Congress and the Treasury Department acted to proscribe multiple transactions by statute and regulation *after* the acts underlying the indictment, there is also the question whether this prosecution is consistent with the Ex Post Facto Clause.

I.

WHETHER AN EXECUTIVE AGENCY CAN CRIMINALIZE CONDUCT AND AFFORD THE FAIR WARNING REQUIRED BY THE FIFTH AMENDMENT THROUGH REPORTING REQUIREMENTS THAT ARE NOT PROMULGATED PURSUANT TO THE ADMINISTRATIVE PROCEDURE ACT IS AN IMPORTANT AND RECURRING QUESTION OF FEDERAL LAW

It is a fundamental principle of due process "that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited." *Dunn v. United States*, 442 U.S. 100, 112 (1979). To ensure that a legislature speaks with special clarity when marking the boundaries for criminal conduct, courts must decline to impose punishment for actions that are not " 'plainly and unmistakably' " proscribed. *Id.* (quoting *United States v. Gradwell*, 243 U.S. 476, 485 (1917)); *see Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (penal statute must define criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in manner that does not encourage arbitrary and discriminatory enforcement).

Should a criminal statute or regulation promulgated thereunder contain any ambiguity, it is the settled rule of law that " 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.' " *Whalen v. United States*, 445 U.S. 684, 695 n.10 (1980) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). As the Court explained in *Liparota v. United States*, 471 U.S. 419, 427 (1985):

> Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability.

The Bank Secrecy Act of 1970 (the "Act") requires the reporting of certain foreign and domestic currency transactions and in 1984 provided in pertinent part:

> (a) When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. . . .

31 U.S.C. § 5313(a) (1982). At the time of the conduct alleged in the superseding indictment, the Act itself contained no delineation of what transactions would be subject to its mandate, but rather authorized the Secretary of the Treasury to fill in these details through regulation.

In *California Bankers Association v. Shultz*, 416 U.S. 21 (1974), this Court, in upholding the constitutionality of the Bank Secrecy Act of 1970, thought it "important to note that the Act's civil and criminal penalties attach *only* upon violation of *regulations* promulgated by the Secretary; if the Secretary were to do nothing, the Act itself would impose no penalties on anyone." *Id.* at 26 (emphasis added).[3] At the time of the *California Bankers*

[3] *California Bankers* did not address the Fourth and Fifth Amendment claims of depositors and significantly predated the conflict that has arisen among the Circuits construing the Act. The Court did not address the Act as applied to multiple transactions or "structuring." Rather, the Court addressed only the recordkeeping requirements "*in fact*" imposed by the Secretary through regulation. *California Bankers Association*, 416 U.S. at 64 (emphasis in original).

decision, and at the time of the alleged offenses at issue here, no regulations prohibited or even made reference to the aggregation of multiple currency transactions. As the Court recognized:

> In the implementing regulations promulgated under this authority, the Secretary has required *only* that financial institutions file certain reports with the Commissioner of Internal Revenue. The regulations require that a report be made for each deposit, withdrawal, exchange of currency, or other payment or transfer "which involves *a transaction* in currency of more than $10,000."

Id. at 38-39 (emphasis added).

At the time of the indictment, the applicable regulation promulgated under the Act, 31 C.F.R. § 103.22(a) (1984), provided only that a report should be filed by a financial institution with respect to "*each* deposit, withdrawal, exchange of currency . . . which involves *a transaction* in currency of more than $10,000.00" (emphasis added). Furthermore, a financial institution was defined as "each . . . branch," 31 C.F.R. § 103.11(a), 103.11(g), thus imposing no duty on the separate branches of Farm & Home to aggregate the defendants' transactions in this case. Not until 1987 were the regulations amended to define a "financial institution" as including all of its domestic branch offices for the purpose of the Act's reporting requirements. *See* 31 C.F.R. § 103.22(a)(3) (1987). Neither the Act nor the regulations required or even mentioned the aggregation of multiple transactions at one or multiple bank branches to reach the $10,000 level.

The absence of any requirement under the Act of aggregation or any prohibition of structuring was recognized by the Government prior to the conduct alleged here. In 1981, the Comptroller General of the General Accounting Office (the "Comptroller") issued Audit Report GGD-81-80 (July 23, 1981), entitled, "Bank Secrecy Act Reporting Requirements Have Not Yet Met Expec-

tations, Suggesting Need for Amendment" ("GAO Report"). The Comptroller noted that the regulations "were neither thorough nor precise," *id.* at 23, and that they were "silent" as to the propriety of a customer's conducting multiple transactions in a single day that exceeded $10,000 in the aggregate. *Id.* According to the Comptroller, the regulations "did not specifically prohibit dividing a large transaction into several smaller transactions to circumvent the reporting requirement." *Id.* at 24. The GAO Report included letters from the Acting Commissioner of the Internal Revenue Service and the Department of Justice stating, respectively, that the Treasury should consider revising the regulations to prevent the use of multiple transactions, and, more bluntly, that "loopholes exist in the Treasury regulations implementing the Act. . . ." *Id.* at 90-91.

The United States Attorney for the Central District of California has judicially admitted that the structuring of currency transactions prior to 1986 was lawful. In *United States v. Hoyland*, 914 F.2d 1125 (9th Cir. 1990), the Government stipulated:

> James Hoyland is charged with having engaged in currency transactions in United States currency with various financial institutions in amounts less than $10,000 in order to avoid the bank's filing of a currency transaction report (CTR). He opened a bank account with the Bank of Newport on October 14, 1986 and began making deposits in amounts less than $10,000 knowing the bank would not file a CTR. Mr. Hoyland was told by bank employees and believed these transactions were legal, *and in fact they were. At that time, there was nothing that prevented a bank customer from depositing sums of money less than $10,000 even if it was done with the intent of preventing a financial institution from filing a currency transaction report which would have been required if the deposit had been more than $10,000.*

Id. at 1126 (emphasis added). The issue was whether Hoyland was lawfully convicted of structuring monetary transactions *after* January 27, 1987, when Congress, by virtue of the Money Laundering Control Act of 1986, made it a crime to structure a transaction to avoid a bank's filing of a CTR.

The Government has therefore conceded through several of its agents the failure of the regulations to speak to the conduct at issue here. In light of this void in the regulations, the Government has tried in this and other cases to salvage multiple transaction prosecutions by reliance on Treasury Department Currency Transaction Reporting Form 4789. The reverse side of the form, which was in use in 1984, states:

> Multiple transactions by or for any person which in any one day total more than $10,000 should be treated as a single transaction, if the financial institution is aware of them.

This language was cited by the Eighth Circuit, both in this case and in the earlier case of *United States v. Polychron*, 841 F.2d 833 (8th Cir.), *cert. denied*, 488 U.S. 851 (1988), in support of its holding that structured transactions are subject to the Act's reporting requirements *if the bank is aware of them*. The reliance of the Eighth Circuit on Form 4789 violates the fair warning requirement of the Fifth Amendment and the separation of powers doctrine, because the form was not promulgated in the manner required to give it the force and effect of law.

An agency form that is not the product of agency rulemaking under the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (1988) ("APA"), cannot create criminal liability not otherwise existing under the applicable statutes and regulations. "The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Liparota v. United States*, 471 U.S. 419, 424 (1985). The legislature cannot abdicate this responsi-

bility by giving an agency carte blanche to create its own definitions of criminal conduct without following required procedures.[4]

Agency rules have the force and effect of law when they are within the scope of delegated duties and enacted in accordance with applicable statutory procedures. *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-316 (1979); *United States v. Nixon*, 418 U.S. 683 (1974); *Service v. Dulles*, 354 U.S. 363 (1957). Federal courts have recognized that Congress "may validly provide a criminal sanction for violation of rules or regulations which it has empowered an administrative agency to promulgate *if such delegation of authority is accompanied by sufficient guidelines and standards for the exercise of the authority*." *Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 561 (2d Cir.) (emphasis added), *cert. denied*, 488 U.S. 924 (1988).[5] This Court has long held that criminal prosecutions can be predicated on agency regulations if those regulations "relate to matters clearly indicated and authorized by Congress." *United States v. Grimaud*, 220 U.S. 506, 522 (1911). This Court has emphasized, however, that "not all agency publications are of binding force. . . ." *Lyng v. Payne*, 476 U.S. 926, 937 (1986) (citing *Schweiker v. Hansen*, 450 U.S. 785, 789 (failure of Social Security Administration to follow Claims Manual not wrongful because Claims Manual not a regulation; "[i]t has no legal force, and it does not bind the SSA")).

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[4] As the Court warned in *Bowsher v. Synar*, 478 U.S. 714, 727 (1986) (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)):

> [T]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.

[5] *See also United States v. Daniel*, 813 F.2d 661, 663 (5th Cir. 1987) ("the mere fact that regulations affect an aspect of the crime or punishment does not implicate due process, provided the regulations are legally and constitutionally promulgated").

The traditional understanding, at least since enactment of the APA in 1946, has been that in order for an executive agency to establish standards of conduct which, if not complied with, result in criminal penalties, it must follow the procedures required by Congress in the APA. The Bank Secrecy Act itself states that reports are only required to be filed "under circumstances the Secretary prescribes *by regulation.*" 31 U.S.C. § 5313(a) (emphasis added). Here, Form 4789 and the aggregation requirement it embodies were indisputedly not promulgated as a regulation and thus can have no force and effect to establish a criminal violation.

In its Reply Brief to the Eighth Circuit, the Government argued, with apparent success, that the Form was effective in that its use was authorized pursuant to the Paperwork Reduction Act of 1980 ("PRA"), 44 U.S.C. §§ 3501 *et seq.* (1988). During the hearing in the district court on the motions to dismiss, the Government called as a witness a desk officer of the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs to describe OMB's review of Form 4789, which he conceded did not include the extensive notice and comment required by the APA. Because of this PRA review, the Government argued that the Form imposed a duty to aggregate multiple transactions that had the force and effect of law despite the lack of compliance with the APA. The Eighth Circuit, in turn, cited the language of the Form in support of its holding that the bank had an obligation to file CTRs with respect to structured transactions of which it was aware.

Despite the numerous challenges to prosecutions predicated on Form 4789's aggregation language, this is apparently the first time the Government has invoked the PRA to elevate that language to law. In so doing, the Government is attempting to inflate the substantive implications of the PRA, much as it did in *United Steelworkers of America v. Pendergrass (USWA III)*, 855 F.2d 108 (3d Cir. 1988), *aff'd, Dole v. United Steelworkers,* 110

S. Ct. 929 (1990). The PRA was enacted in 1980 for the purpose of streamlining information collection activities by the various agencies of the Federal Government. The primary goals of the PRA are "to minimize the Federal paperwork burden for individuals, small businesses, State and local governments, and other persons;" "to minimize the cost to the Federal Government of collecting, maintaining, using, and disseminating information;" "to maximize the usefulness of information collected, maintained, and disseminated by the Federal Government;" and "to coordinate, integrate and, to the extent practicable and appropriate, make uniform Federal information policies and practices." 44 U.S.C. § 3501. The PRA provides that forms used by agencies to obtain information from the public must be reviewed and approved by the OMB. There is nothing in the PRA or its legislative history to suggest that it was intended to afford executive agencies an avenue outside the well-established parameters of the APA to enact original, binding legislative rules.

If the multiple transaction language of Form 4789 does not embody a legislative rule, then it is, at best, an agency interpretation of 31 C.F.R. § 103.22(a) (1984). This Court has never held that an agency's interpretation can cure the inherent ambiguity of a regulation or statute. Indeed, such a holding would upset the balance between the branches of government of which this Court spoke in *Liparota*, and cede to the executive branch legislative authority to define the criminal law.

This case provides an appropriate vehicle for identifying the type of administrative rulemaking necessary to afford "fair warning" of criminal penalties; for clarifying the substantive implications, if any, of the PRA; and for defining as a constitutional matter the proper relationship between the criminal and administrative law.

II.

THERE IS A CONFLICT IN THE CIRCUITS ON THE CRIMINALITY OF THE CONDUCT UNDERLYING THE INDICTMENT AND THE LEGAL IMPORT OF FORM 4789

These issues arise against the backdrop of a striking conflict in the Circuits. The exercise of this Court's discretion to grant a writ of certiorari is especially compelling where there is a conflict among the circuits regarding the construction of federal criminal law. *E.g., United States v. O'Brien*, 391 U.S. 367 (1968). Here, the Eighth Circuit has held that if a bank knows that currency transactions are being structured by a customer to avoid the application of the Act's reporting requirements — even though the Act and regulations in effect at the time did not by their terms prohibit structuring — the customer may be held liable for criminal conspiracy and aiding and abetting the bank's failure to file a CTR. This decision is in conflict with decisions of the First, Seventh and Ninth Circuits. *See United States v. Anzalone*, 766 F.2d 676 (1st Cir. 1985) (reporting act does not require disclosure of structured transactions due to ambiguity of coverage of act created by Government itself); *United States v. Risk*, 843 F.2d 1059 (7th Cir. 1989) (employee of bank could not be held in violation of reporting act requirements in cashing five checks at five branches of bank on same date); *United States v. Reinis*, 794 F.2d 506 (9th Cir. 1986) (customer cannot be guilty of conspiracy and aiding and abetting where bank did not violate law by failing to aggregate multiple transactions on the same day); *see United States v. Hoyland*, 914 F.2d 1125, 1126 (9th Cir. 1990) ("several circuits, including ours, had held it no crime to structure deposits so that the reporting requirement would not be triggered").

As the First Circuit held in *United States v. St. Michael's Credit Union*, 880 F.2d 579, 596 (1st Cir. 1989):

> Since aggregation is not explicitly or implicitly required by either the statute or its implementing regulations, we find that imposing criminal liability for such conduct violates the notice provisions of the fifth amendment.

See also United States v. Risk, supra; United States v. Reinis, supra. The First Circuit's 1985 decision in *United States v. Anzalone*, 766 F.2d 676 (1st Cir. 1985), led directly to the amendment of the reporting regulations:

> Although this court, like all other institutions of the United States, is supportive of the law enforcement goals of the government and society, we cannot engage in unprincipled interpretation of the law, lest we foment lawlessness instead of compliance. *Kolender v. Lawson*, 461 U.S. 351, 361, 103 S. Ct. 1855, 1860, 75 L.Ed.2d 903 (1983). This is particularly so when the confusion and uncertainty in this law has been caused by the government itself, and when the solution to that situation, namely eliminating any perceived loop holes, lies completely within the government's control. If the government wishes to impose a duty on customers, or "other participants in the transaction," to report "structured" transactions, let it require so in plain language. It should not attempt to impose such a duty by implication, expecting that the courts will stretch statutory construction past the breaking point to accommodate the government's interpretation.

766 F.2d at 682.[6] Several Circuits, however, have held to the contrary. *See, e.g., United States v. Richeson*, 825 F.2d 17 (4th

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[6] The Eighth Circuit's citation in the opinion below to another First Circuit case, *United States v. Bank of New England, N.A.*, 821 F.2d 844 (1st Cir.), *cert. denied*, 484 U.S. 943 (1987), as supporting authority, misinterprets the First Circuit's holding. In *Bank of New England*, the bank convicted of violating the Act accepted multiple checks under $10,000 from the same cus-

(Footnote 6 continued on next page)

Cir. 1987); *United States v. Cook*, 745 F.2d 1311 (10th Cir. 1984), *cert. denied*, 469 U.S. 1220 (1985); *United States v. Giancola*, 783 F.2d 1549 (11th Cir.), *cert. denied*, 479 U.S. 1018 (1986). The conflict among the Circuits with respect to reporting requirements under the pre-amendment Bank Secrecy Act has resulted in the unconscionable scenario under which Williams has been prosecuted in Missouri for conduct which, if engaged in across the Mississippi River in Illinois, would have been viewed by the federal authorities as completely lawful.

The Circuits are also split on the effect of Form 4789. Courts of the First, Seventh and Ninth Circuits have recognized that Form 4789 does not have the force of law. *E.g., Anzalone*, 766 F.2d at 679 n.6; *United States v. Risk*, 672 F. Supp. 346, 358 (S.D. Ind. 1987), *aff'd*, 843 F.2d 1059 (7th Cir. 1988); *United States v. Reinis*, 794 F.2d 506 (9th Cir. 1986); *United States v. Richter*, 610 F. Supp. 480, 489 (N.D. Ill. 1985), *aff'd*, 793 F.2d 1296 (7th Cir. 1986), *cert. denied*, 479 U.S. 855 (1987); *cf. United States v. $200,000 in U.S. Currency*, 590 F. Supp. 866 (S.D. Fla. 1984) (Form 4790, a reporting form for customs currency transactions, held a nullity because not properly promulgated under the APA). As the District Court for the Southern District of Indiana held in *Risk*:

> [T]hat form was not properly promulgated as an implementing rule to the statute by publication in the Federal Register. Therefore, the reliance upon this Form by other

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(Footnote 6 Continued)

tomer, drawn on the same account, *at one time*. The First Circuit categorized this conduct as "a single physical transfer of currency in excess of $10,000" that clearly fell within the applicable regulations. It did not address the question raised here: whether the regulations could be read to impose a reporting obligation when a customer receives more than $10,000 currency by making numerous visits on the same day to different branches of the same bank. 821 F.2d at 849.

> courts, either wittingly or unwittingly, was misplaced, and this court is compelled to conclude that the statute and regulations are silent as to a multiple transaction situation.

Risk, 672 F. Supp. at 358. The Seventh Circuit has held that the directions contained in Form 4789 were no more than interpretive rules which could not impose a legal duty. *United States v. Gimbel,* 830 F.2d 621, 626 (7th Cir. 1987). It is apparently to avoid the logic of these decisions that the Government now argues that Form 4789 has the force of law by virtue of the blessing it received from OMB under the Paperwork Reduction Act.

Other courts, including the Eighth, Fourth and Eleventh Circuits, have cited the language of Form 4789 relating to multiple transactions in support of their holdings that a customer may be liable under the Act for structuring transactions with the bank's knowledge. *See* A-4; *United States v. Richeson*, 825 F.2d 17, 18-19 (4th Cir. 1987); *United States v. Tobon-Builes*, 706 F.2d 1092, 1098 (11th Cir. 1983) ("[c]onsidering the foregoing statutes, regulations, *and form*," customer held liable under 18 U.S.C. § 1001 for purchasing 21 cashier's checks from eleven banks each in amounts less than $10,000) (emphasis added).

This conflict in the Circuits is intolerable. People are and will continue to be prosecuted for these offenses in only selected areas of the country. Although the statute and regulations have been amended, questions about the criminality of this pre-1987 conduct will arise for years to come under indictments that allege a continuing conspiracy extending beyond 1986 and as the amount of these transactions over time are "aggregated" under the Sentencing Guidelines. *See* Federal Sentencing Guidelines Sections 2S1.3; 4A1.3.

III.

THE EFFECT OF THE EIGHTH CIRCUIT'S DECISION IS TO IMPOSE CRIMINAL LIABILITY ON PETITIONER EX POST FACTO

The conduct at issue occurred in 1984: before the Eighth Circuit had addressed the legality of multiple transactions that are less than $10,000 each but more than $10,000 in the aggregate. The GAO had already declared that such transactions were not addressed by the governing statute and regulations. The statute contained no language whatsoever addressing multiple transactions and the applicable regulation had very specific language referring only to single transactions exceeding $10,000.

It was not until 1986 that the Eighth Circuit first construed the Act and it did so in such a way as to indicate that Petitioner's conduct was lawful.

> The Currency and Foreign Transactions Reporting Act (Reporting Act), 31 U.S.C. § 5313(a) authorizes the Secretary of the Treasury to require domestic financial institutions and any other participant in a monetary transaction to file a currency transaction report (CTR) with the Secretary. The regulation enacted by the Secretary, 31 C.F.R. § 103.22(a), requires only that the financial institution file a report, and then only if the monetary transaction exceeds $10,000.00. The regulation does not require other participants, such as Larson, to file a report, nor does it require them to inform the bank about other currency transactions they have made.

United States v. Larson, 796 F.2d 244, 246 (8th Cir. 1986). In 1987 The Money Laundering Control Act of 1986 and the 1987 Amendments to Implementing Regulations Under the Bank Secrecy Act became effective. They expressly prohibited structured transactions. In 1988, after acknowledging these amend-

ments, the Eighth Circuit first suggested that structured transactions *prior* to 1986 might be a violation of 31 U.S.C. § 5313(a). *United States v. Polychron*, 841 F.2d 833 (8th Cir.), *cert. denied*, 488 U.S. 851 (1988). In 1989 — almost five years after the underlying events — the instant indictment was returned.

"The basic principle that a criminal statute must give fair warning of the conduct that it makes a crime has often been recognized by this Court." *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964). A "potentially greater deprivation" of this right to fair notice arises where, as here, "a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction. . . ." *Id.* at 351-52. Such an unforeseeable judicial enlargement of a criminal statute operates as an *ex post facto* law forbidden by the United States Constitution. *Id.* at 352; *see also Marks v. United States*, 430 U.S. 188 (1977) (due process clause precludes application to criminal defendants of standards for violation imposed by subsequent Supreme Court decision).

> The fundamental principle that "the required criminal law must have existed when the conduct in issue occurred," . . . must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," it must not be given retroactive effect. . . .

Bouie, 378 U.S. at 354 (citations omitted).

Statements by the Treasury Department about the 1987 changes in the regulations highlight the failure of the original regulations to address multiple transactions. In its 1986 Administrative Procedure Act Federal Register Publication, the Secretary of the Treasury noted that the proposed amendment "*codifies* the CTR Form 4789 instruction that currently requires financial institutions to report multiple, same day transactions. . . ." (emphasis added). 51 Fed. Reg. 30234 (August 25, 1986). The Secretary explained in greater depth:

> The Department's experience in enforcing the [Bank Secrecy] Act in recent years has indicated that the following proposed substantive regulatory changes are needed to strengthen enforcement of the Act. In particular, recent judicial decisions, such as *United States v. Anzalone* . . . have drawn attention to the fact that the regulations *may be inadequate* to sustain prosecutions for failing to report transactions that had been structured to evade the current reporting requirements. In light of cases such as *Anzalone*, the Department of Justice believes that certain changes to the currency transaction reporting requirements are needed to *expand the coverage of the Act* to ensure the collection of needed information, and to strengthen enforcement of the Act.

51 Fed. Fed. 30233, 30234 (August 25, 1986) (emphasis added).

The amendments to the Act and the regulations enacted years after Petitioner's alleged offense were clearly intended to fill a void in the law. Those amendments were prospective only. In light of the Ex Post Facto Clause, the Government cannot now seek to prosecute individuals under the pre-existing law by glossing it with the coverage of subsequent amendments.

CONCLUSION

Petitioner Thomas A. Williams' liberty is at risk for alleged conduct that federal courts of appeals and federal agencies have concluded was not criminal at the time of his actions. In its zeal to prosecute, the Government is compromising such fundamental due process precepts as fair warning and the nonretroactivity of the criminal law. It is also compounding the confusion surrounding the legality of these transactions and undermining the substantive and procedural requirements of the Administrative Procedure Act by arguing that the multiple transaction language of Form 4789 became "law" by virtue of OMB's

review under the Paperwork Reduction Act. Petitioner respectfully submits that a decade of uncertainty is enough. Only this Court can answer the fundamental question and stop the legal contortions it has engendered. Petitioner respectfully requests that this Petition for a Writ of Certiorari be granted.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2223

United States of America,
Appellant,

v.

Farm & Home Savings Association,
Thomas A. Williams, Ronald Meyer,
Appellees,
Ronald Whitaker, Fred Wilmot and
Leon Miller a/k/a Lee Miller,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: January 7, 1991
Filed: May 13, 1991

Before LAY, Chief Judge, MAGILL and LOKEN, Circuit Judges.

LOKEN, Circuit Judge.

The United States appeals from the district court's dismissal of most of counts I, III, and IV of a multi-count indictment charging appellees and others with violations of the reporting requirements of the Bank Secrecy Act of 1970 (the "Act") and its

implementing regulations, 31 U.S.C. § 5313(a) and 31 C.F.R. Part 103. In dismissing these portions of the indictment, the district court distinguished our prior decision in *United States v. Polychron*, 841 F.2d 833 (8th Cir.), *cert. denied*, 488 U.S. 851 (1988). We conclude that the conduct charged in the indictment, if proved, would violate the Act as construed in *Polychron*. Accordingly, we reverse.

The indictment alleges that defendants Thomas A. Williams, Ronald Meyer, and Ronald Whitaker each purchased money orders totaling more than $10,000 from three branches of defendant Farm & Home Savings Association in Dallas on September 26, 1984; and that Meyer and defendant Leon Miller each purchased money orders totaling more than $10,000 from three St. Louis branches of Farm & Home on November 28, 1984. The Dallas purchases were made with the "knowledge, acquiescence and consent" of defendant Fred Wilmot, then a Senior Vice President of Farm & Home in Dallas, and the St. Louis purchases were made with the "knowledge, acquiescence and counsel" of James Besher, then a Senior Vice President of Farm & Home in St. Louis, who was not named as a defendant. Pursuant to an alleged conspiracy among all the defendants, Farm & Home did not file Currency Transaction Reports ("CTRs") with respect to any of these purchases, as allegedly required by the Act.

After defendants Farm & Home and Whitaker pleaded guilty to certain of the charges and the district court dismissed Count II of the indictment, relating to the Dallas purchases, for lack of venue, the remaining defendants — bank customers Williams, Meyer and Miller and bank officer Wilmot — moved to dismiss Counts I, III and IV.[1] Count I charges these defendants, the

[1] Count V of the indictment charged Wilmot with giving false testimony before a St. Louis grand jury investigating possible violations of the Act by Farm & Home and its officers. Count V was not dismissed but is not otherwise relevant to this appeal.

appellees before this court, with conspiracy to violate the Act in violation of 18 U.S.C. § 371. Count III charges appellees with knowingly and willfully causing Farm & Home to fail to file CTRs in connection with the St. Louis money order purchases, in violation of 31 U.S.C. §§ 5313 & 5322 and 18 U.S.C. § 2. Count IV charges appellees with knowingly and willfully concealing the material facts that would have been disclosed to the Internal Revenue Service had CTRs been filed in connection with the St. Louis purchases, in violation of 18 U.S.C. §§ 1001 & 2.

The district court dismissed all charges against appellees Wilmot, the Texas bank officer, because the indictment failed to allege that he had engaged in the deliberate structuring of the St. Louis transactions to avoid the CTR reporting requirement. The district court also dismissed the charge that appellees Meyer, Williams and Miller violated § 1001 on the ground that these bank customers had no duty to disclose their structured transactions to Farm & Home under this court's decision in *United States v. Larson*, 796 F.2d 244 (8th Cir. 1986). However, the district court held that the indictment properly charges the customer appellees with aiding and abetting, and conspiring to aid and abet, the nonfiling of CTRs in violation of the Act because it is alleged that Farm & Home was aware of their structuring of the St. Louis purchases.

I.

A fundamental threshold issue in this case is whether, under the Act and regulations in effect in 1984, the facts alleged in the indictment imposed a duty on Farm & Home to file one or more CTRs reflecting the St. Louis money order purchases. The indictment alleges that the customer defendants purchased multiple money orders totaling more than $10,000, but less than $10,000 each, from three branches of Farm & Home on the day

in question. In 1984, the regulations[2] required Farm & Home to file a CTR in connection with "each . . . transfer . . . which involves a transaction in currency of more than $10,000," 31 C.F.R. § 103.22(a). The instructions to Treasury Department Form 4789, the CTR report, advised financial institutions that, "Multiple transactions by or for any person which in any one day total more than $10,000 should be treated as a single transaction, if the financial institution is aware of them." However, the statute and regulations were not amended to expressly cover such "multiple transactions" until after the 1984 events here in question occurred. Therefore, appellees argue, Farm & Home had no duty to file CTRs in connection with the St. Louis purchases and appellees cannot be charged with *any* crimes in connection with those purchases under this court's decision in *Larson.*

In *Larson*, we held that a bank customer who purchased ten cashier's checks at four bank branches on the same day, for the purpose of avoiding the filing of CTRs, was not liable for concealing material facts from the government in violation of 18 U.S.C. § 1001, or of aiding and abetting a violation of the Act in violation of 18 U.S.C. § 2, because the banks were unaware of the structured transactions and thus had no duty to file CTRs. 796 F.2d at 247. Although other circuits have held to the contrary, *see, e.g., United States v. Cure*, 804 F.2d 625, 629 (11th Cir. 1986), we have consistently adhered to our decision in *Larson.*

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[2] The Act requires a domestic financial institution, such as Farm & Home, to "file a report . . . at the time and in the way the Secretary [of the Treasury] prescribes" in connection with each currency transaction "in an amount . . . or under circumstances the Secretary prescribes by regulation," § 5313(a). Willful failure to file is punishable under § 5322(a) and (b). Thus, the Secretary's regulations define the scope of a bank's reporting duties under the Act. See generally *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 37-41, 57-59 (1974), which upheld the constitutionality of the Act.

Subsequent to *Larson*, we considered whether the Act's reporting requirements in effect in 1984 would be violated if a bank officer affirmatively structured a currency transaction, either on his own behalf or on behalf of a bank customer, in order to avoid causing the bank to file a CTR. In *United States v. Polychron, supra*, we held that a bank officer who "structures an otherwise reportable transaction into multiple transactions in a single day that do not individually exceed $10,000" may be criminally liable for causing the bank to fail to file a CTR. 841 F.2d at 837. In *Pilla v. United States*, 861 F.2d 1078 (8th Cir. 1988), we upheld the conviction of a bank advisory board member who, with the assistance of a bank officer, structured cash transactions in excess of $10,000 with the bank on behalf of a purported drug dealer, without the filing of CTRs. Following *Polychron*, we held that Pilla's relationship with the bank gave him a duty to report the transactions; moreover, unlike the bank in *Larson*, the bank was aware of the duty to report because a bank officer was Pilla's co-conspirator. *Id.* at 1081.

In this case, the indictment alleges that appellees Meyer and Miller agreed with Besher, the Farm & Home officer in St. Louis, to cause Farm & Home to fail to file CTRs, and that Miller and Meyer purchased money orders in amounts in excess of $10,000 per person per day without the filing of CTRs "with the knowledge, acquiescence and counsel" of Besher. The district court held that the bank had no duty under *Polychron* to file CTRs in this situation because the bank customers, Miller and Meyer, rather than the bank officer, Besher, actually "structured" the transaction. We disagree. Where the indictment alleges this level of knowledge and participation by a responsible bank employee, we think it immaterial to the bank's duty to report that the money order purchases were physically handled by the

customers at various bank branches. These allegations if proved[3] would establish that the bank knew that one or more transactions in excess of $10,000 per day were being structured in an attempt to evade Farm & Home's reporting requirements under the Act. This is sufficient to impose a duty on the bank to file CTRs under *Polychron*, which in this regard is consistent with the cases from nearly every circuit that has considered the question. *See United States v. Bank of New England*, 821 F.2d 844, 850-51 (1st Cir.), *cert. denied*, 484 U.S. 943 (1987); *United States v. Heyman*, 794 F.2d 788, 792 (2d Cir.), *cert. denied*, 479 U.S. 989 (1986); *United States v. American Investors*, 879 F.2d 1087, 1098-1099 (3d Cir.), *cert. denied*, 110 S. Ct. 368 (1989); *United States v. Thompson*, 603 F.2d 1200, 1203-04 (5th Cir. 1979); *United States v. Hayes*, 827 F.2d 469, 472 (9th Cir. 1987); *United States v. Cook*, 745 F.2d 1311, 1315-16 (10th Cir. 1984), *cert. denied*, 469 U.S. 1220 (1985); *United States v. Cure*, 804 F.2d 625, 627-28 (11th Cir. 1986). *Contra, United States v. Risk*, 672 F. Supp. 346, 357-58 (S.D. Ind. 1987), *aff'd*, 843 F.2d 1059, 1061-62 (7th Cir. 1988). Appellees' principal argument on appeal is, in effect, that we should reject this nearly uniform line of authority and overrule *Polychron*. We decline to do so.

II.

With this threshold issue resolved, we now turn to the specific crimes charged in Counts I, III and IV of the indictment.

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[3] In reviewing the sufficiency of an indictment, we accept the government's allegations as true, without reference to allegations outside the indicting document. *Boyce Motor Lines v. United States*, 342 U.S. 337, 343 & n.16 (1952); *United States v. Von Barta*, 635 F.2d 999, 1002 (2d Cir. 1980), *cert. denied*, 450 U.S. 998 (1981)

Count I — The Conspiracy

Count I alleges that appellees and their co-defendants willfully and knowingly conspired (i) to defraud the United States by obstructing the governmental function of collecting data through CTRs; (ii) to cause Farm & Home to fail to file CTRs; and (iii) to conceal material facts in a matter within the jurisdiction of the Treasury Department. To state a conspiracy violation under 18 U.S.C. § 371, the government must allege "(1) an agreement to commit an illegal act; (2) an unlawful objective; and (3) an act done in furtherance of the conspiracy committed by at least one of the participants." *United States v. Cerone*, 830 F.2d 938, 944 (8th Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988).

The district court correctly held that the Count I charges are sufficient as to appellees Meyer, Williams and Miller. The alleged participation of bank officer Besher in the scheme, if proved, would establish that Farm & Home had a duty under *Polychron* to file CTRs in connection with the St. Louis money order purchases. In *Polychron*, the dismissal of a conspiracy count against the participating bank officer was reversed. Likewise, here, the motion to dismiss the conspiracy charges against these bank customers was properly denied. *See also United States v. American Investors, supra*, 879 F.2d at 1100-1103; *United States v. Sans*, 731 F.2d 1521, 1530-1532 (11th Cir. 1984), *cert. denied*, 469 U.S. 1111 (1985).

The district court dismissed Count I as to appellee Wilmot on the ground that the specific acts alleged "even if proved, do not sufficiently allege a substantive crime against the United States." We believe that this reflects too narrow a view of the alleged conspiracy.

With respect to Wilmot, the indictment alleges that defendants caused Farm & Home not to file CTRs in connection with the Dallas money order purchases "with the knowledge, acqui-

escence and consent and at the direction of" Wilmot (Count II);[4] that Wilmot and Besher had a telephone conversation before the St. Louis purchases (an alleged overt act); and that defendants then caused Farm & Home not to file CTRs in connection with the St. Louis purchases "with the knowledge, acquiescence and counsel of" Besher (Count IV). While only one of the 34 overt acts alleged in Count I relates specifically to Wilmot, that one, his telephone conversation with Besher, forges a potentially significant link between what might otherwise be separate Dallas and St. Louis conspiracies. Moreover, Count I charges all defendants, including Wilmot, with willful and knowing conspiracy to commit the violations alleged. Under these circumstances, Count I was sufficient as to Wilmot. As we said in *United States v. Thomas*, 759 F.2d 659 (8th Cir. 1985):

> The essence of a conspiracy is the agreement, and once a defendant's participation has been established he is culpable for everything said or done by any of the other conspirators in furtherance of the conspiracy.

Id. at 668.

Count III — The Substantive Violations of the Act

Meyer, Williams and Miller. Count III alleges that the customer appellees violated 31 U.S.C. §§ 5313 and 5322 and 18 U.S.C. § 2 by causing Farm & Home to fail to file CTRs for money order purchases in excess of $10,000 per person per day at three Farm & Home branches in St. Louis. The district court held that the indictment sufficiently alleges that these appellees

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[4] Under *Polychron*, because of Wilmot's alleged participation, Count II properly alleged violations of the Act in connection with the Dallas purchases if venue was proper; the government has not appealed the district court's dismissal of Count II for lack of venue.

violated 18 U.S.C. § 2 by aiding and abetting in the non-filing of CTRs in violation of 31 U.S.C. § 5313, because Farm & Home was aware of the wrongful structuring of the transaction by reason of the "knowledge, acquiescence and counsel" of Besher. As the above discussion makes clear, this was a correct application of *Polychron*.

Wilmot. The district court dismissed Count III as to Wilmot because, unlike the bank officer in *Polychron*, the indictment does not charge *him* with "intentionally structuring transactions in order to avoid the statutory filing requirements," and because the specific facts alleged as to Wilmot "do not sufficiently allege a crime against the United States." We disagree. As discussed above, it was the alleged participation of Besher, not Wilmot, that imposed a duty on Farm & Home to file CTRs in connection with the St. Louis transactions. Count III alleges that Wilmot knowingly and willfully aided and abetted this St. Louis reporting violation. Though Wilmot could not be charged with the substantive offense of failing to file CTRs in connection with the St. Louis transactions, because he had no duty as a Dallas officer of Farm & Home to do so, he may be charged with aiding and abetting such an offense if he "in some way associated himself with the criminal venture as something he wished to bring about and . . . sought by his actions to make it succeed." *United States v. American Investors, supra*, 879 F.2d at 1103. Thus, Count III sufficiently alleges a violation of 18 U.S.C. § 2 by Wilmot.

Count IV — The § 1001 Violation

Count IV alleges that appellees violated 18 U.S.C. §§ 1001 and 2 by concealing from the government, "by scheme and device," the facts that would have been disclosed had CTRs been filed in connection with the St. Louis purchases. The district court dismissed this Count as to the customer defendants based upon the holding in *Larson* that bank customers have no duty to disclose their conduct to banks, and as to Wilmot because this

Count "does not sufficiently allege a crime against the United States."

We agree that, under *Larson*, the alleged § 1001 violations were properly dismissed as to these defendants because they had no duty to disclose information to the government by filing CTRs. However, Count IV also accuses them of aiding and abetting a § 1001 violation by Farm & Home, in violation of § 2. In *Larson*, the § 2 conviction was reversed because "the banks were unaware that Larson was structuring his transactions," 796 F.2d at 247. Here, on the other hand, Count IV alleges that bank officer Besher participated in the "scheme and device" to cause Farm & Home to conceal information from the government by failing to file CTRs. Thus, as to the § 2 charge in Count IV, like the § 2 charge in Count III, this case is distinguishable from *Larson*.

It is now settled that the charge of failing to file a CTR in violation of 31 U.S.C. § 5313, and the charge of concealing the facts called for on the report in violation of 18 U.S.C. § 1001, are distinct crimes having distinct elements of proof that may be separately punished. *See United States v. Woodward*, 469 U.S. 105, 108-09 (1985) (per curiam). An additional question, however, is whether this indictment adequately charges the bank defendants with knowingly and willfully concealing or covering up a material fact "by any trick, scheme, or device" in violation of 18 U.S.C. § 1001.

We do not examine this issue in a vacuum. In *United States v. Shannon*, 836 F.2d 1125 (8th Cir.), *cert. denied*, 486 U.S. 1058 (1988), defendant was a bank chairman who obtained a large cash loan, deposited the cash in the bank's correspondent account at another bank, and then transferred the money from that account to his personal use, all without the filing of any CTRs. Distinguishing *Larson*, this court affirmed Shannon's conviction for failing to cause the filing of CTRs, based upon his

position of control at the first bank. However, we affirmed the dismissal of a charge that he also violated § 1001 by concealing facts from the second bank which caused it to fail to file a CTR:

> To establish a concealment violation of section 1001, the government must prove more than just a passive failure on the part of the defendant to reveal a material fact. Rather, the government must prove an affirmative act by which a material fact is actively concealed. Here . . . there was no evidence that the defendant took affirmative steps to conceal these facts from [the second bank].

836 F.2d at 1129-1130 (citations omitted).

In this case,t he indictment alleges that the customer appellees, who were in the same relationship to Farm & Home as defendant was to the second bank in *Shannon*, adopted an elaborate plan involving numerous individuals, *including Besher, a senior officer of Farm & Home*, to ensure that facts were not disclosed to the government through the filing of CTRs by Farm & Home. Whether this plan as implemented constituted the affirmative steps necessary under *Shannon* to violate 18 U.S.C. § 1001 may well be a close question. But we think it is properly a question for the jury. The indictment, as it must, pleads the necessary elements of the § 1001 offense by Farm & Home and Besher, and fairly informs the customer defendants of the aiding and abetting charges they must defend. *See Hamling v. United States*, 418 U.S. 87, 117 (1974). Under these circumstances, the § 2 violations alleged in Count IV of the indictment should not be dismissed as to the customers because it fails further to define the "scheme and device" alleged; it is for the jury and the trial court to determine whether appellees' conduct fell within the statutory proscription. *See United States v. London*, 550 F.2d 206, 213 (5th Cir. 1977). For the same reasons, we conclude that Count IV sufficiently charges Wilmot with violating 18 U.S.C. § 2 by knowingly and willfully participating in the scheme and device to conceal.

Accordingly, the order of the district court dismissing portions of Counts I, III and IV of the indictment is reversed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 89-198 CR(3)

UNITED STATES OF AMERICA,
Plaintiff,

v.

FARM AND HOME SAVINGS ASSOC., et al.,
Defendants.

ORDER

This matter is before the Court on motions to dismiss Counts I, III, and IV of the superseding indictment, filed by defendants Wilmot, Williams, Meyer and Miller, on the grounds that defendants were not under any duty to file currency transaction reports with respect to the transactions alleged in the superseding indictment.[1] For the reasons set forth below defendants' motions will be granted in part and denied in part.

Pursuant to 28 U.S.C. § 636(b), the pretrial matters were referred to United States Magistrate William S. Bahn for review and recommendation. Magistrate Bahn held a hearing on the motions to dismiss and recommended denial. Defendants objected and requested a de novo hearing thereon. On May 31, 1990, the Court took evidence and heard oral argument on the motions. Based on the arguments of counsel and materials

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[1] Count II was dismissed by this Court on May 24, 1990, for improper venue. Court V charges defendant Wilmot with perjury in connection with the investigation of these charges, and is not the subject of the motions presently before the Court.

submitted at the hearing, the Court makes the following findings, for the purpose of these motions only.

The superseding indictment alleges the following: In 1984, defendants Meyer and Williams, and an IRS special undercover agent met with defendant Wilmot, senior vice president of the Farm & Home Savings and Loan branch in the Dallas, Texas metropolitan area. After leaving Wilmot's office, Meyer and Williams purchased a total of $120,000 in money orders at three separate Farm & Home branches in the Dallas, Texas area. No CTRs were filed on these transactions.

Thereafter, defendant Wilmot telephoned James Besher, the senior vice president of Farm & Home branches in the St. Louis, Missouri metropolitan area. Defendants Meyer and Miller then had a conversation with Besher, after which Meyer and Miller purchased several money orders each under $10,000, but all totalling more than $10,000. No CTRs were filed on these transactions.

The superseding indictment charges defendants with failing to file currency transaction reports or causing them not to be filed (31 U.S.C. §§ 5313 and 5322 and 18 U.S.C. § 2) and with wilfully concealing a material fact from the Department of Treasury in regard to the St. Louis transactions (18 U.S.C. § 1001) (Count IV); and with conspiring to violate the currency transaction reporting statute and regulations which require the filing of such reports in connection with the transactions in St. Louis, and Dallas (18 U.S.C. § 371) (Counts I and III).

At the time of the events alleged in the indictment, the currency reporting regulations promulgated pursuant to the authority established in 31 U.S.C. § 5313 provided as follows:

> Each financial institution shall file a report on each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which

> involves *a transaction in currency of more than $10,000.* Such reports shall be made on forms prescribed by the Secretary and all information called for in the forms shall be furnished.

31 C.F.R. § 103.22(a) (emphasis added).

In 1987, the regulation was changed as follows:

> Multiple currency transactions shall be treated as a single transaction if the financial institution has knowledge that they are by or on behalf of any person and result in either cash in or cash out totalling more than $10,000 during any business day.

Defendants argue that because the Reporting Act and implementing regulations, in effect in 1984, spoke only in terms of "a transaction" of more than $10,000, CTRs were not required to be filed in a situation where an individual purchased in excess of $10,000 in separate money orders from a financial institution in one day, and the bank was not required to aggregate the individual transactions in arriving at the reporting figure of more than $10,000. Defendant Wilmot further argues that the allegations in the superseding indictment pertaining to him do not allege a crime against the United States.[2]

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[2] Defendant Wilmot also argues that his statements to defendants Meyer and Williams (which were electronically recorded and a transcript of which was introduced into evidence at the hearing) of his understanding of the requirements of the federal banking regulations with respect to the filing of currency transactions was accurate, and cannot be considered criminal activity. In deciding a motion to dismiss an indictment, the Court is restricted to the allegations contained in the indictment. Accordingly, the Court makes no determination as to whether these conversations constitute criminal activity.

In order to be valid, an indictment must allege that the defendants performed acts which if proven, constitute violations of the laws as charged. "If the acts *alleged in the indictment* do not constitute a violation of law, the indictment is properly dismissed." *United States v. Polychron*, 841 F.2d 833, 834 (8th Cir. 1988) (emphasis added).

Moreover, in addressing the motions to dismiss, the Court does not write on a clean slate, but is guided in its decisionmaking by the principles established in the Eighth Circuit opinions of *Polychron*, 841 F.2d 833 (8th Cir. 1988) (addressing issues of customer liability under the Reporting Act), and *United States v. Larson*, 796 F.2d 244 (8th Cir. 1986) (addressing issues of a bank official's liability under the Reporting Act),[sic]

In *Larson*, the bank customer made numerous monetary transactions at four different bank branch locations, each slightly less than $10,000, in an attempt to avoid the reporting requirements of 31 U.S.C. § 5313. The government charged the customer with concealing material facts from the government in violation of 18 U.S.C. § 1001; and because his structured transactions caused the banks to fail to file CTRs, the government also charged defendant with aiding and abetting in violation of 18 U.S.C. § 2. The district court held defendant's conduct violated the law and convicted him of concealing material facts and aiding and abetting.

On appeal, the Eighth Circuit reversed, holding that (1) defendant could not be guilty of concealing material facts unless there was a duty to disclose the facts, and (2) the Reporting Act imposed no duty on a customer to disclose his conduct to the banks. The Court also reversed the conviction for aiding and abetting, noting that "if the banks were unaware that [defendant] was structuring his transactions, then they committed no offense by failing to file CTRs." *Larson*, 796 F.2d at 247.

In light of *Larson*'s holding that the Reporting Act imposes no duty on a customer to disclose his conduct to the banks, the Court finds that the allegations against defendant-customers Meyer, Williams, and Miller do not constitute a violation of law. Thus, the portion of the superseding indictment charging defendants Meyer, Williams, and Miller with concealing a material fact in violation of 18 U.S.C. § 1001, will be dismissed.

Nevertheless, to the extent the indictment alleges defendants aided and abetted in the non-filing of CTRs in violation of 18 U.S.C. § 2, the Court finds that a trier of fact could find from the allegations in the superseding indictment that the customer-defendants spoke with two senior vice presidents of Farm & Home, and that therefore the bank was aware of defendants' structuring. Therefore, the[sic] that extent defendants' motions to dismiss will be denied.

In *Polychron*, the indictment alleged that an unindicted customer deposited over $140,000 in a bank account, and instructed the bank president to withdraw the full amount in cash withdrawals of less than $10,000 each until the account was depleted. The customer provided the president with signed, blank withdrawal slips. The president made 15 withdrawals in all, and on two days made two withdrawals, each under $10,000, but together totalling more than $10,000. No CTRs were filed on these transactions.

The indictment charged the bank president with two counts of failing to file CTRs or causing them not to be filed; with concealing material facts from the Department of Treasury with regard to those transaction[sic]; and with conspiring to violate the Reporting Act and its regulations. The district court granted defendant's motion to dismiss holding that the bank had no duty to report the transactions because the statute and implementing regulations applied only to individual transfers of currency in excess of $10,000 and did not require the aggregation of indi-

vidual same-day transaction. On appeal, the Eighth Circuit reversed, holding that the Reporting Act sufficiently apprised the bank president that when a bank "employee acting within the scope of his employment structures an otherwise reportable transaction into multiple transactions in a single day that do not individually exceed $10,000, the bank, or its officer or employee may be held criminally responsible for failing to file or causing the bank to fail to file a CTR." *Polychron*, 841 F.2d at 837. Accordingly, the appellate court held that the indictment charging a bank president with intentionally structuring transactions in order to avoid the statutory filing requirements in violation of 18 U.S.C. §§ 2 and 1001, sufficiently alleged a crime against the United States.

The government argues that *Polychron*, stands for the proposition that a bank official is criminally liable if he is "involved in" or "has knowledge of" a customer's structuring of transactions. The Court is not persuaded by the government's argument. The *Polychron* court referred repeatedly to Polychrons'[sic] "structuring the withdrawal," drew a distinction between a customer structuring a withdrawal and a bank *structuring* a withdrawal, and cited several cases from other circuits involving a bank or bank official's actual assistance in or structuring of a transaction. Moreover, although the 1987 regulations require a financial institution to report multiple currency transactions totalling more than $10,000 during any business day *if it has knowledge that they are by or on behalf of any single person*, the Court finds that such was not required by the regulations in effect prior to 1987.

The superseding indictment in this case does not charge defendant Wilmot with "intentionally structuring transactions in order to avoid the statutory filing requirements," or with conspiring to structure transactions in order to avoid the statutory filing requirements."Defendant Wilmot's conduct, as alleged in the superseding indictment differs significantly from the bank

president's alleged complicity in the structuring of the customers transactions set forth in *Polychron*. The Court will address the Counts in reverse order, dealing with the substantive count first, and the conspiracy counts second.

Count IV, charging defendants with the substantive violation of 18 U.S.C. § 1001 in connection with the St. Louis transactions alleges only that

(1) defendant Wilmot was the senior vice president of the Farm & Home in Dallas, and

(2) that as part of the scheme defendant Wilmot telephoned James Besher to inform him that defendant Meyer and other individuals would be contacting him.

The Court finds that even if proved, these allegations do not sufficiently allege a crime against the United States.

Count III charging defendants with conspiring to violate 18 U.S.C. § 1001 by causing the non-filing of CTRs in connection with the St. Louis transactions contains no additional allegations in support of the underlying substantive offense. Accordingly, the Court finds Count III does not sufficiently allege a crime against the United States.

Count I, charging defendants with conspiring to violate 18 U.S.C. § 1001 by causing the non-filing of CTRs in both St,[sic] Louis, and Dallas[ ]Texas, alleges only that

(1) defendant Wilmot was the senior vice president responsible for all of Farm & Home Savings Association's branches in the Dallas, Texas metropolitan area; and

(2) defendants Wilmot, Meyer, Williams, and special agent Thompson had a conversation in Wilmot's office at the North Dallas, Texas branch of Farm &

Home Savings Association, after which defendants Meyer and Williams purchased the money orders in question; and

(3) James Besher, not named as a defendant in the indictment had a telephone conversation with defendant Wilmot.

The Court finds these allegations, even if proved, do not sufficiently allege a substantive crime against the United States.

Accordingly,

IT IS HEREBY ORDERED that the Magistrate's recommendation is overruled in part and sustained in part.

IT IS HEREBY FURTHER ORDERED that the motion to dismiss Counts I, III, and IV of the superseding indictment filed by defendants Meyer, Williams, and Miller is granted as to the charge that they concealed, or conspired to conceal material facts from the government, and denied as to the charge that they aided or abetted, or conspired to aid or abet in the non-filing of CTRs.

IT IS HEREBY FURTHER ORDERED that defendant Wilmot's motion to dismiss Counts I, III, and IV of the superseding indictment for failure to allege any crimes against the United States is granted as to this defendant.

/s/ William L. Hungate
UNITED STATES
DISTRICT JUDGE

Dated: 6-27-90